Exhibit A

STATE OF OREGON)
) ss. AFFIDAVIT
County of Marion)

I, VAL D. SLOPER, being first duly sworn on oath, depose and say:

That I am the Presiding Judge of the Circuit Court of Oregon for the County of Marion, Third Judicial District. I was elected to the Circuit Court Bench in November, 1954 and assumed the position in January, 1955. I was elected Presiding Judge in January, 1965 and have served as Presiding Judge since that date.

On the 30th day of August, 1965, the State of Oregon filed a suit for a Declaratory Judgment against the DeLong Corporation and the Travelers' Indemnity Company, Marion County Case No. 59-323. There were numerous motions, demurrers, and other preliminary legal matters prior to the trial that commenced on March 18, 1968. I presided over all preliminary legal matters in Marion County prior to trial.

During the first or second week of March, 1968, there was a pre-trial conference in my office attended by the attorneys for the respective parties. At that time, the attorneys estimated that the trial would last four to six weeks or longer, depending on whether or not a jury was empaneled. Because of my duties as Presiding Judge, I felt I should not personally be involved in a trial of that duration. Consequently, I assigned the case for trial to the Honorable George A. Jones. Judge Jones had no

prior duties in connection with or related to this lawsuit prior to the trial assignment which, according to the best of my recollection, was approximately one week prior to March 18, 1968.

No motions or affidavits were filed by the parties relative to the qualifications of any of the Judges in this district to preside over this case. Moreover, I was not advised formally or informally that any judge in the district, was unacceptable to any of the parties.

DATED this 27th day of March, 1973.

VAL D. SLOPER
Circuit Judge

SUBSCRIBED AND SWORN to before me this 27th day of March, 1973.

B. W. PEYTON
SEAL Notary Public for Oregon
My Commission Expires: Jan. 16, 1973

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Exhibit B

STATE OF OREGON)
) ss. EXHIBIT "B"
County of Marion)

I, Carl A. Haugerud, being first duly sworn on oath depose and say:

That I am the Deputy Administrator of the Vocational Rehabilitation Division of the Department of Human Resources, State of Oregon. In 1960, I was employed by the State Board of Control and served in various capacities until my appointment as secretary on July 1, 1965. The secretary is the chief executive officer serving under the Board.

The Board of Control was made up of the Governor, the Secretary of State and the State Treasurer of the State of Oregon. Among its functions, was the administration of the State Penal Institutions, the State Mental Institutions, the Deaf and the Blind Schools, and the State T.B. Hospital.

In connection with those duties, the Board of Control, in the name of the State, held title to, and administered substantial real property holdings. To assist in the management of real property, the Board of Control Utilized an advisory board, called the "Land Use Committee" which was made up of appointed state officials and private citizens knowledgeable of real property and the management thereof.

One of the properties utilized in connection with the Oregon State Hospital was the "Colony Farm" which is located in Polk County, a few miles distance from Salem, the location of the State Capitol, and the State Hospital.

The farm was used for food production for the feeding of patients in the Oregon State Hospital in Salem.

Due to advances in the treatment of mentally ill patients and due to the construction of the Dammasch State Hospital, which is located about 25 miles north of Salem, the population of the Oregon State Hospital has been declining rapidly. In 1960, there were approximately 3,300 patients in that hospital. As of this date, there are approximately 600 patients there.

The Colony Farm became surplus to the needs of the State. Based on the recommendations of the staff and of the "Land Use Committee", the Board of Control decided to sell the Colony Farm. An appraisal was ordered from the Department of Veterans' Affairs, that maintains a staff of appraisers experienced in the appraisal of farm and residential properties. The appraisal in the amount of $175,000 was received on July 29, 1965.

In a meeting on August 17, 1965, the Board authorized sale of the property and established a minimum price of $175,000. The property was advertised for a cash sale in that amount.

On October 12, 1965, having received no bids, the Board directed the staff to study alternative methods of selling the Colony Farm. On November 3, 1965, the Board adopted a plan providing for a $175,000 minimum price with 25 percent down, the balance payable at 5½ percent interest over a 20-year period. The property was again advertised for sale.

On December 21, 1965, the Board, having received no bids, authorized the re-advertisement of the farm at $175,000 with $25,000 down, the balance being payable over a 20-year period at 5½ percent interest. On Feb-

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ruary 1, 1966, the Board of Control accepted the bid of "Green Villa Farms" at $175,000 under the advertised terms, who was the only bidder for the farm.

In advertising the Colony Farm for sale, the Board of Control placed ads with the Los Angeles Times, the San Francisco Examiner, the Portland Oregonian, the Statesman and the Capitol Press in Salem, the Itemizer-Observer in Dallas, Oregon (the County seat of Polk County) and with the Northwest Farm paper, an organization that publishes separate farm papers in Oregon, Washington, Idaho, Utah and Montana.

Green Villa Farms paid off their contract in full in July, 1967.

The Board of Control was abolished as of June 30, 1969 by act of the Oregon legislatures. The minutes, files and records of the Board are now in the Oregon State Archives. I reviewed and examined those records prior to making this affidavit.

In summary, the decision to sell the Colony Farm was made by the Board of Control with the advice of its staff and its "Land Use Committee". Through extensive advertising and sealed bids; the State, sold the property at its appraised value in the ordinary course of business using customary practices.

Dated this 27th day of March, 1973.

CARL A. HAUGERUD

Subscribed and sworn to before me this 27th day of March, 1973.

SEAL

JUANITA D. OLSON
Notary Public for Oregon
My Commission Expires: 2-29-76

Exhibit C

STATE OF OREGON)
) ss. AFFIDAVIT
County of Marion)

I, DON J. MASON, being first duly sworn on oath, depose and say:

That I am an independent fee appraiser and my office is located at 2586 Twelfth Place, S.E., Salem, Oregon. I am a member of the American Institute of Real Estate Appraisers and am an accredited rural appraiser. I am also a member of the Society of Real Estate Appraisers. I have been a real estate appraiser since 1959 and have had extensive experience in the appraisals of farms and ranches as well as the appraisal of other residential, commercial and industrial properties. Prior to 1959, I had 13 years experience in farm management, finance and other real estate oriented activities.

In January, 1959, I was employed by the State of Oregon, Department of Veterans' Affairs, as Farm Appraiser Supervisor. I appraised a substantial number of farms and ranches in that capacity. In addition to my own appraisal work, I supervised the other farm appraisers on the staff.

In the summer of 1965, I was given an assignment to appraise a property in Polk County, Oregon owned by the State Board of Control and known as the Colony farm. I was generally familiar with the area, where the property was located and made an extensive and detailed investigation of the area and of numerous comparable properties that had sold in the open market. I wrote an appraisal report dated July 28, 1965 setting out my opinion that the fair cash market value of the Colony

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farm was in the sum of $175,000. I had an alternative value of $177,500 if the farm was sold in two parcels.

I had no interest in the property whatsoever nor did I have knowledge of who, if anyone, was interested in purchasing the subject property.

I have been informed that the Colony farm was purchased by Green Villa Farms, a partnership composed of Asa Lewelling, George A. Jones and David Kennedy, Jr. At the time of the appraisal, I was not personally acquainted with any of those purchasers. I had heard of Mr. Asa Lewelling and knew he was a practicing attorney in Salem. I was introduced to Mr. Lewelling on one occasion some time in the early 1960's. I also recognized generally that the Kennedy family were farm operators in the Mid-Willamette Valley area at that time.

In March, 1968, I resigned from the Department of Veterans' Affairs and established my own appraisal practice. The first appraisal that I made for the Oregon Highway Division in any capacity was during 1969.

To summarize, my appraisal of the Colony farm was made routinely and objectively in the ordinary course of a routine assignment. My value conclusions were independently developed; and in my opinion, they represented the market value of the real property at the time the appraisal was made.

DATED this 26th day of March , 1973.

DON J. MASON, MAI

SUBSCRIBED AND SWORN to before me this 26th day of March , 1973.

SEAL

JUDY A. LeFORCE
Notary Public for Oregon
My Commission expires: 1-28-77

Defendants' Theory Unsound—Evidence

Although it is not deemed necessary to find or point out specific evidence justifying the trial Court's rejection of defendants' theory of what caused the bad concrete, it is nonetheless persuasive that several of plaintiff's experts had considered defendants' theory, found it unsound, and testified to the effect that it just could not have happened that way.

Defendant's theory at the trial was that vast quantities of riverbed material somehow worked its way under, over or through the steel cofferdams and into the seal area. (Tr. 5460-5462; 6447; 6783) In their brief, defendants characterized this theory in terms of "hydraulic" action (App. Br. 141, 142; 323).

Glen Paxson, a highly qualified former Deputy State Highway Engineer with over 40 years experience in bridge construction (Tr. 4695-4708; 4768-4770), testified that, in his opinion, based upon assumed facts, his own review of various documentary evidence, personal observation at the site and his general knowledge and experience (Tr. 86[illegible]), the underrun in the seal concrete was not caused by the intrusion of materials from outside the cofferdam (Tr. 8631).[18] Basically, this was because the only way for sand or other streambed material to get into the seal area was down the outside of the cofferdam piles, under the tips, and up the inside of the cofferdams. Neither the minimal differences in hydraulic "head," or

[18] This testimony was on rebuttal, and not subject to defendants' motion to strike, denial of which is now assigned as error (App. Br. 155).

any differences in the weight of materials inside and outside the cofferdam, were sufficient to have forced sand underneath the sheet piles. "* * *The probability of such a thing happening is so remote that it can be considered as impossible." (Tr. 8631-8633)

Dr. Peter Klingeman, a professor of River Hydraulics of the Oregon State University School of Engineering (Tr. 8667, 8668) opined that substantial quantities of material did not intrude beneath the cofferdam sheeting (Tr. 8683). The only three way for this to occur would be by heaving, a blowout, or piping (Tr. 8684. Heaving could only occur if a large differential head existed and if there was a very minimum of tip embedment of the sheeting, neither condition existed. (Tr. 8684, 8685) A blowout would require that there be very little or no tip embedment as a result of scour (Tr. 8685); here, the earlier scouring had been arrested so that a scour mechanism could no longer occur, to undermine the tips of the sheeting, and consequently a blowout could no longer occur (Tr. 8686-8688). Piping would also have required a substantial difference in water elevation or "head", which did not exist (Tr. 8688, 8689). The theoretical impossibility of any of these phenomena was confirmed by the sounding maps, which failed to show that any large quantities of material disappeared from immediately outside the cells in December, when the seals were poured (Tr. 8689, 8690).

It may also be noted that the defendants' witness Kennedy, who devoted considerable effort to explaining

and demonstrating the "blowout" and "heaving" phenomena (Tr. 6428-6442; Ex. F-13), freely admitted that this related to conditions existing in September, when the scour occurred, and not in December when the seals were poured (Tr. 6438; 6475-6477; 6497).

Slow Rate of Pour as a Cause—Evidence

There was evidence that at a meeting on January 22, 1964 (Tr. 417), after it was discovered that the seals were defective, Colonel DeLong himself acknowledged that the rate of pour at Pier 169 had been about 25 or 29 yards per hour, and that on future tremie pours it should be about 80 yards per hour (Tr. 431, 431).

At the time the contract was awarded, the DeLong management planned a concrete operation capable of producing 70 to 100 yards per hour (Tr. 4206-4208; 4712, 4713). Hans Wendel, DeLong's Chief Engineer (Tr. 6633), assumed a maximum rate of pour of tremie concrete in the seals of 100 yards per hour, in his calculations in designing a cofferdam at Pier 169 (Tr. 6824-6833; Ex. 437, sheet 10). The DeLong people were disappointed in the performance of their concrete batching plant (Tr. 6844).

The actual rate of pour, as computed by one of the State engineers, averaged 25.1 yards per hour at the east or upstream seal, and 27.5 yards per hour at the west or downstream seal. (Ex. Q-1; Supporting data for these figures may be found in Exs. 112, 113 and 488).

In another case, Mr. Wendel testified on deposition that they expected production of 40 bags or 60 yards per

hour (Tr. 6845-6847). In that case, DeLong asserted against the supplier of the "Roto-bags" used in batching concrete, a counter-claim for $180,000, based in part on the supplier's alleged promise that the bags could be filled at a rate of not less than 40 bags per hour (Ex. 414). That "Answer and Cross-Complaint" was filed January 3, 1964, shortly after the seals were poured and the underrun discovered.

On the monthly estimate for work through December 10, 1963, the State had paid DeLong approximately $90,000 for the seal concrete placed in the first or downstream seal at Pier 169 (Ex. 6, Est. No. 13; Tr. 2425, 2426). On the following estimate, for work through January 10, 1964, the State withheld payment for the upstream seal of some $90,000, and deducted the $90,000 paid the previous month for the downstream seal (Ex. 6, Est. No. 14; Tr. 2429-2431), as a result of which DeLong claimed it had been underpaid $180,000 (Ex. S-8).

The Court, it is submitted, could well have regarded DeLong's assertion of a $180,000 claim against its supplier of equipment for deficiencies in the rate of concrete production, just at the time DeLong was losing $180,000 for pouring bad concrete as persuasive evidence that DeLong recognized a relationship between the rate of pour and the failure of the seal concrete. At the very least, it establishes that DeLong knew that the rate of pour at the Pier 169 seals had been too slow.

Be that as it may, however, there was ample direct evidence that the slow rate of pour was one of the sig-

nificant factors in producing the defective material in the seals.

Glen Paxon, whose qualifications have already been mentioned (supra, p. 25), designated the slow rate of pour as one of the primary reasons for the poor concrete (Tr. 4763).

Walter Cathey, a retired construction man of vast experience in pouring underwater concrete (Tr. 8466-8473), testified that on a tremie pour of the size here involved, good construction practice required a minimum rate of pour of 100 yards per hour (Tr. 8478, 8479), and that the slow rate of pour here contributed to the concrete's failure to meet specifications (Tr. 8518, 8519).

Ben C. Gerwick, Chairman of the Board of a contracting firm, had over 60 years experience in bridge building, both as an engineer and as a contractor (Tr. 8393-8399). His firm had built wharves and bridges "practically all over the globe" (Tr. 8399, 8400). He had extensive experience with the placing of underwater concrete (Tr. 8402-8406) and had been publicly identified as the man who had been down personally in more cofferdams and caissons than any other man in the world (Tr. 8407, 8408). His opinion was that on a pour of the size here involved the rate of pour should be about 120 yards per hour (Tr. 8408-8410).

Arthur Elliott, the California bridge engineer whose qualifications were previously discussed (supra, p. 15), opined that the slow rate of pour was a contributing cause of the failure, and that a pour of this size should

not be attempted without a capacity of at least 80 and preferably 100 yards per hour (Tr. 8799-8806).

Use of One Tremie Pipe and Water in Pipe as Causes of Defective Concrete—Evidence

At both seals in Pier 169, the concrete was poured through a single tremie pipe (Tr. 4741); Ex. 112, p. 23) which, after pouring at one location, would be moved to another location in the cofferdam (Tr. 4743; Ex. 489). Acceptable seals of comparable size were produced at Pier 170, where at least two and probably four tremie pipes were used (Tr. 8887, 8888; Ex. 491-493; *Cf.* Tr. 8899, 8901).

At times, as when the seal or prime was lost, water got into the pipe instead of concrete, and water would, on such occasions, gush between the flanges of the tremie tube (Tr. 2104, 2105; Ex. 113, p. 19).

Even Colonel DeLong agreed that concrete falling through water would "wash" and separate (Ex. T-15, p. 209). One of defendants' expert witnesses, William Mueser, agreed that if concrete fell from a tremie pipe through open water it would tend to separate (Tr. 5488, 5489).

According to Mr. Paxson, the basic cause of the bad concrete was the washing of the cement from the sand and gravel (Tr. 4763). Although the basic cause of the washing resulted from the slow rate of pour, leakage in the tremie pipe could also cause some washing (Tr. 4764).

Mr. Cathey believed that at least four tremie pipes

should be used on a pour of this magnitude (Tr. 8479, 8480). The joints on a jointed tremie pipe should be kept in a water tight condition (Tr. 8481). This witness was of the opinion that here the leaks in the tremie tube were the basic cause of the bad concrete, although other factors such as the slow rate of pour also contributed (Tr. 8518, 8519).

Ben Gerwick was of the belief that a least twelve and perhaps sixteen tremie pipes should have been used (Tr. 8411).

Arthur Elliott was of the opinion that it would be virtually impossible to make a satisfactory tremie pour with only one tremie pipe handled as was shown on Ex. 489 (Tr. 8803).

It is submitted that the evidence was more than sufficient to support the trial Court's findings as to what in fact caused the concrete to be bad. Certainly the evidence supported the Court's finding to the effect that it rejected, i.e., that defendants had failed to establish their supposed excuse for their breach of contract in refusing to remove and replace the unacceptable seals.

Defendants' Responsibilities, Termination of Contract—Evidence

The Court's remarks regarding it being the defendants' responsibility to pour good seals, to replace the defective material, etc., are of course derived from the basic nature of the contract and its specific terms and provisions. For example, the contractor agreed that the seals should be formed of Class A Concrete, with 10%

additional cement (Tr. 379; Ex. 3, p. 56), and it was provided that Class A concrete would, within 28 days, develop a compressive strength of 3300 pounds per square inch. (Tr. 380; Ex. 3, p. 58; Ex. 4, p. 31, art. 2.4.5) Failure of the seal material to meet these standards has been discussed (supra, p. 3). It was contemplated that only the best general practice was to prevail, and that only material and workmanship of the first quality were to be used (Ex. 4, pp. 2, 3, art. 1.4.2). It was agreed that the performance of work under inspection would not relieve the contractor from his responsibility to comply with the specifications, nor from his responsibility if the work was not so performed (Ex. 4, p. 4, art. 1.5.2).

All concrete was requred to be placed so as to avoid segregation of the materials, and where placed through pipes, the pipes were to be kept full of concrete, insofar as practicable, and their lower ends were to be kept buried in the newly placed concrete (Ex. 4, pp. 33, 34, art. 2.4.9). Concrete seals under water were required to be placed continuously from start to finish, and the surface was to be kept as nearly horizontal as practicable; tremie tubes were required to be kept sealed and to be kept full to the bottom of the hopper (Ex. 4, p. 36, art 2.4.12).

The defendants' refusal to proceed with the necessary remedial work, and other work on the project was discussed above (supra, pp. 4, 5), and this was assuredly adequate ground for cancellation of the contract, as declared by the Court (See Ex. 4, p. 21, art. 1.8.7).

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I certify that the following material is from the transcript of proceedings in the related case, *Delong Corporation, et al. v. Lee Johnson,* Civil Case Number 73-20, U. S. District Court for Oregon. The hearing on Plaintiff's motion on January 30, 1973 for a preliminary injunction. George W. Mead, Esq. (now deceased) was of Counsel for Plaintiff DeLong Corporation. Presiding was the Honorable James M. Burns, District Judge. Dale A. Ray, 442 U. S. District Court, Portland, Oregon, was the reporter.

Leslie B. Hampton
Counsel for Respondent

* * * *

MR. MEAD: Yes, Your Honor. I think I will stick mostly to the factual situation in the case and confine myself to that and to the factual situation to a limited degree, because I don't think that in this proceeding that the Court can determine questions of fact other than what appears on the record as a matter of a prima facie case, that is stated by the affidavit.

I think the background of the time of the filing of these various different cases, the proceedings with respect to Judge Jones, the timing of this all has some relevance.

Now, in the first instance, let me state, Your Honor, that in our affidavit, and in our complaint, we don't say that Judge Jones did anything fraudulent, that Judge Jones did anything that was improper, except that we believe that he should disclose to us his relationship with the State of Oregon at the time this case was assigned to him, and this is what we say with regard to Judge Jones, and we say that we were entitled to that and we were entitled then, at that

time, to make a decision on whether we want them to proceed with Judge Jones and waive a jury and go on with him at that time or have some other judge.

* * * *

Now, we say that at that time, in view of what had transpired, well, we feel that Judge Jones had the responsibility or should have, at that time, advised us of his relationship with the State of Oregon in connection with the acquisition of this property. We don't say that he did anything improper in acquiring the property; we don't say that he did anything improper in the trial of the case, and we don't accuse him of any fraudulent or misconduct of any kind (emphasis added) but we believe that he should have disclosed that to us; that is all we are saying about Judge Jones.

* * * *

In 1966, Judge Jones and his associates purchased the property. The affidavits show that the value that was affixed at that time was some $421 an acre for the property. We don't say that that is a low valuation, that there was anything the matter with the transaction, but we do say that—then he mortgaged the property, ultimately, at a contract, was paying the State, and then in 1967 he arranged for a mortgage on that property, an adjacent property, on the basis of a much higher valuation, fifty percent higher.

Now, we don't say there is anything wrong with that either. Then he paid off the mortgage and acquired the property from the State in 1967; I believe it was in June or July or thereabouts.

Now, we don't say that there is anything improper with that transaction. We recognize that in addition to the large prison farm property that was required, there was some adjacent properties that were also involved in that transaction. We are not concerned

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with the price; we are not concerned whether it was a profitable transaction to Judge Jones or an Unprofitable transaction. All we say is that we should have known about it at that time, known about his dealings of that type with the State of Oregon. We don't say that the State officials did anything improper with regard to it. It's merely a matter of disclosure, Your Honor, at that time, and we do say that in view of what had transpired there on our—

THE COURT: Well, excuse me. Wait a minute now, Mr. Mead.

MR. MEAD: Yes.

THE COURT: The allegation in the complaint which is filed is that Judge Jones purchased the property from the State at a very favorable price.

MR. MEAD: Yes, it was a favorable price.

THE COURT: Well, the allegations in Mr. Chesty's affidavit suggests that it was the same price as set forth in the appraisal that Mr. Mason made.

MR. MEAD: Yes.

THE COURT: Now, would one not properly assume that Mr. Mason was appraising the property for the State as the then owner and potential seller?

MR. MEAD: Mr. Mason, as I understand it, was a fee appraiser in that area, Your Honor, and did make an appraisel for the State. Also, he had made appraisals for the Highway Department, as I understand it, and we are not saying that there was anything improper about Mr.—that it was a favorable price, and I think it was a favorable price, because within just two years later, there was a loan made on the property, as I understand it, for $650 an acre.

THE COURT: Well now, wait a minute. Wait a minute, Mr. Mead. Let's stay with the allegation that it was acquired at a favorable price. Now, when you say "favorable price," do you mean if a person reads

that and reads through this allegation, you say the business relationship of Judge Jones involved the acquisition, during the pendency of this litigation, of certain valuable farm property, by the trial judge, together with two partners, from the plaintiff in the suit, from the State of Oregon, at a very favorable price.

MR. MEAD: Yes, sir.

THE COURT: Now, that sounds as if he got some real good deal from the State of Oregon; the fact of the business is, that as far as the operative allegations in the affidavit is, that he and his partners bought from the Board of Control at appraised value. Now, does that made it a favorable price?

MR. MEAD: I believe when we look at what happened two years later, it was a favorable price, and it was why I prefaced my remarks, if the Court please, and I jump right on that, that we don't say there was anything improper about it; the price was too high, it was too low, we don't say that at all. (emphasis added)

THE COURT: Well, it certainly sounds as if there is something funny going on when you say that Judge Jones bought a piece of property from the State of Oregon at a very favorable price. Now, secondly, we know that that property was purchased for a hundrey seventy-five thousand dollars, or $421 an acre.

MR. MEAD: That's right.

THE COURT: Right. Then you say two years later, when Prudential came in and paid off the State contract on that, as well as other parcels, that you end up with an overall average of $643 an acre, or whatever the $600 price is.

MR. MEAD: Approximately, that's right, and I

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mentioned that right off as Your Honor recalled, to the Court.

THE COURT: All right.

MR. MEAD: And I recognize—

THE COURT: Does that mean, therefore, that as of the time of the Prudential mortgage, that Prudential valued this parcel at $643 an acre?

MR. MEAD: Well, I think it means, Your Honor, that they must have valued it certainly at a great deal more than $421 an acre.

THE COURT: How do we know? Because we don't know the value of the other parcels.

MR. MEAD: That is absolutely true, Your Honor, and it was impossible for us to develop that, and I also made the observation, as the Court will recall, that this was a parcel combined with a larger parcel of property. We do know, I think, that most of this land was tillable land. I don't know what the other land could have been worth, $250 an acre, or it could have been worth a thousand dollars an acre, and I recognize that, and this is what I am mentioning, but I do say that if you acquire property at $421 an acre and two years later the price is $650 an acre, on an average, that that is a favorable transaction. I don't say that it is a favorable price. I mean by that that if I would buy the corner across the street over here, Your Honor, for a hundred thousand dollars, whether it would be appraised or not, and two years later sell it for a hundred fifty thousand dollars, that that hundred thousand dollar purchase would be a favorable price; that is all I am saying.

THE COURT: But there isn't any evidence here that that land was worth $643 an acre two years later.

MR. MEAD: Well, this was the average price, I believe, by the deed records that we were able to

determine, Your Honor, from the public record as to what the price was obtained.

THE COURT: That's like saying that if I sell Mr. Shenker a 1967 Ford for $500 and he gets a loan on it and then two years later he gets another loan on that Ford and four Cadillacs, that all of a sudden that Ford is worth a thousand dollars on the average, sounds like he's got a good deal on that Ford.

* * * *

I hereby certify that the following material is also from the transcript of proceedings in the District Court case, *DeLong v. Lee Johnson,* Case Number 73-20. The following is a portion of the oral opinion of the Honorable James M. Burns, District Judge, on February 21, 1973, denying Plaintiff's motion for a preliminary injunction. Roberta A. Armstrong, Court Reporter, Room 442, U. S. District Court, Portland, Oregon, reported the proceeding.

Leslie B. Hampton
Counsel for Petitioners

. . . This leaves the first two contentions which I'll discuss at some greater length.

First is the contention with respect to the judicial disqualification issue and second, is the contention based upon the receipt into evidence of the two allegedly forged or unconstitutionally got together Exhibits 113 and 488, I think I have the correct numbers there. Is there a substantial factual and legal likelihood that plaintiff will prevail on the judicial disqualification issue? I believe not for the following reasons:

In the first place, we're dealing with a somewhat peculiar situation in that under the Oregon statute any party has a right to disqualify two judges based upon a mere conclusory allegation that the judge is prejudiced against the party, and the essence of what

plaintiffs say here in their pleadings is that the deprivation occurred because they were unaware of the land transaction which had occurred between the State of Oregon and Judge Jones prior to the trial of the case in Marion County Circuit Court, that had they been aware of that matter, they would have exercised their right under the disqualification statute to have filed an affidavit of prejudice and therefore they would not have been required to go to trial before Judge Jones.

Thus, plaintiffs say they have been deprived of due process by virtue of being deprived by an impartial tribunal to hear their case, and I must say I've had considerable difficulty in analyzing this claim because of the existence of the arbitration case which has been cited—I do not recall the name of it now, but we've all read it and discussed it at some length.

Nonetheless, the two leading cases are the *Tumey* case and the *Ward* case, and I do not regard those cases as calling for a conclusion that in the precise situation that we have here, the failure of Judge Jones to have disclosed the land transaction and thus the preventing as a result of the filing of an affidavit of prejudice, is the constitutional equivalent of the lack of partiality amongst the tribunal that was found by the Supreme Court in the *Ward* and the *Tumey* cases.

A party does not have, in my judgment, a constitutional right to an automatic change of judge statute. A party has a constitutional right to a judge who is fair and distinterested, but the parties here and particularly at the last time that we argued this matter on January 30, the parties specifically disclaimed any claim that Judge Jones was in fact actually prejudiced. That is not said once, but said a number of times by Mr. Mead, so what we have here is a claim that Judge Jones' failure to disclose the land trans-

action prevented the plaintiffs from exercising their rights to an automatic change of judge under an Oregon statute. (Emphasis added)

I do not regard that Oregon statute or its violation as being of constitutional magnitude and I find a significant and substantial difference between the thrust of the cases mentioned and this case, so without even getting into the question which may also be involved in this particular contention, the question of due diligence, without even getting into that and assuming that the plaintiffs here were duly diligent vis-a-vis the Judge Jones' land transaction disclosure matter, I do not believe that the deprivation which the plaintiffs claim they suffered, would amount to an unconstitutional deprivation and so therefore, I cannot say that there is a substantial likelihood that the plaintiffs would prevail on that contention.

With respect to the exhibits which were alleged to have been prepared and/or altered or otherwise handled so as to produce a judgment based upon forged or otherwise unconstitutionally prepared documents, I am satisfied of the following:

Namely, that I am not satisfied that there is a substantial or factual likelihood that the plaintiffs will be able to prevail on this score because I'm not satisfied that the plaintiffs will be able to show that factually that they exercised due diligence with respect to the investigation of this matter, and insofar as this is a Reid type case, it is my belief that one of the essential elements of a Reid cause of suit is the exercise of due diligence whether an appeal is pending or not, and I cannot say from what is here before me that I believe there is a substantial factual likelihood that plaintiffs will prevail on that issue when this case comes to trial.

I have some question in my mind, but I don't think it's necessary to reach a decision on it. I have some

question in my mind as to whether or not there is a substantial legal likelihood that the plaintiffs could prevail on this score, but I find it unnecessary to answer that because I have already made a finding that there is no showing of a substantial factual likelihood that the plaintiffs will prevail.

The reason that I say I have question in my mind about that is that in the context of that case and the length of it, and the manner in which the exhibits came in and he whole matrix of that case, I'm not so sure legally that even if it were shown that the documents were forged, that it would entitle the plaintiffs to relief here.

* * * *

I hereby certify that the affidavits reproduced in the Appendix (pp. 1-A–7-A) are true copies of the original and the whole thereof as filed in *DeLong v. Lee Johnson*, Civil Number 73-20.

I further certify that the above excerpts from the Federal District Court proceedings on January 30, 1973 (App. pp. 27-A–32-A) and on February 21, 1973, (App. pp. 32-A–35-A) are true copies of the original as reported and certified to the above named Court reporters.

Leslie B. Hampton
Counsel for Respondent